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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

James Stickle; Eleanor Riggio; Frank)  
Acuna; Joseph Biernacki; Gordon Farmer;)  
Rhealyn Holland; Richard Lamasters;)  
Kenneth Allen, et. al, on behalf of)  
themselves and all employees similarly)  
situated,

Plaintiffs,

vs.

SCI Western Market Support Center, L.P.)  
a/k/a SCI Western Market Support Center,)  
Inc.; SCI Eastern Market Support Center,)  
L.P.; SCI Houston Market Support Center,)  
L.P.; SCI Funeral and Cemetery)  
Purchasing Cooperative, Inc.; Service)  
Corporation International; Jane D. Jones;)  
Gwen Petteway; Thomas Ryan; Curtis)  
Griggs; the SCI 401K Retirement Savings)  
Plan; and Julie Douglas,

Defendants.

No. CV 08-083-PHX-MHM

**ORDER**

This action arises out of alleged violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, based on a purported failure to pay wages to certain employees of SCI subsidiary companies. Plaintiffs also asserts derivative claims for purported violations of the Employment Retirement Income Security Act, 29 U.S.C. § 1332(a)(3), 29 U.S.C. § 1104(a)(1), 29 U.S.C. § 1059(a)(1); and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, based on Defendants' alleged

1 FLSA violations. The Complaint names as Defendants numerous entities and individuals,  
2 each of whom, Plaintiffs assert, was an employer, joint employer, or alter ego for purposes  
3 of the FLSA claim.

4 Presently pending before the Court are three Motions to Dismiss filed by various  
5 Defendants. Two motions seek dismissal of certain Defendants based on the lack of personal  
6 jurisdiction (Fed.R.Civ.P. 12(b)(2)), and on Plaintiffs' failure to state a claim upon which  
7 relief may be granted (Fed.R.Civ.P. 12(b)(6)). One of these motions has been filed by  
8 Defendants SCI Eastern Market Support Center, L.P., ("SCI Eastern") and SCI Houston  
9 Market Support Center, L.P. ("SCI Houston"). The second motion has been filed by  
10 individual Defendants Jane D. Jones, Gwen Petteway, Thomas Ryan, Curtis Briggs, and Julie  
11 Douglas (the "Individual Defendants").

12 The third motion is entitled "Motion to Dismiss or Strike pursuant to Fed.R.Civ.P.  
13 12(b)(2), 12(b)(6), and 12(f)." This Motion was filed by Defendants Service Corporation  
14 International ("SCI"), SCI Funeral and Cemetery Purchasing Cooperative, Inc., ("the  
15 Cooperative"), SCI Western Market Support Center, L.P., ("SCI Western"), and SCI 401K  
16 Retirement Savings Plan (the "Plan").

17 Defendants' Motions to Dismiss have characteristics similar to a Motion for Summary  
18 Judgment, including the citation to documents outside the pleadings. However, the parties  
19 have all indicated they would like to proceed without converting the Motions to Dismiss to  
20 a Motion for Summary Judgment.

21 Also pending is Plaintiffs Motion for an Equitable Toll of the Statute of Limitations.  
22 All four Motions are fully briefed. In addition, the parties have submitted supplemental  
23 briefing regarding the compatibility of FLSA opt-in and Rule 23 opt-out actions in the same  
24 action. After reviewing all papers submitted and hearing oral argument, the Court issues the  
25 following Order.

**BACKGROUND**

This action arises out of alleged violations of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.* (“FLSA”), based on purported failures to pay wages to certain employees of subsidiary companies of Service Corporation International, a Texas corporation (“SCI”). Plaintiffs’ Complaint also asserts derivative claims, two under the Employment Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1332(a)(3), 29 U.S.C. § 1104(a)(1), 29 U.S.C. § 1059(a)(1) – one claim for failure to keep adequate records sufficient to determine benefits due and one claim for breach of fiduciary duty – and a derivative claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, (“RICO”). The Complaint names as Defendants numerous entities and individuals, each of whom, Plaintiffs assert was an employer, joint employer or alter ego for purposes of the FLSA. (Compl. ¶ 29).

In their Complaint, Plaintiffs assert that they worked for Defendants and were not paid their regular or statutorily required rate of pay for all hours worked and were not paid at time and a half for hours they worked over 40 hours a week. Plaintiffs claim it was Defendants’ policy not to pay for certain compensable work Plaintiffs regularly performed. Plaintiffs provide the following examples of Defendants’ policies and practices that Plaintiffs’ argue have deprived Plaintiffs of their earned wages and wage premiums.

Subclass A: Defendants implemented an “On Call Pay Policy.” Under the policy, employees perform work by handling calls and other work related issues after normal business hours, but Defendants did not compensate employees for all such “on call” work performed.

Subclass B: Defendants implemented a “Community Work Policy.” Under the policy, Plaintiffs contend that employees performed “community work” so as to increase Defendants’ revenues but that Defendants did not compensate the employees for such time spent in community work in furtherance of the employer’s business under the “Community Work Policy.”

1        Subclass C: Defendants implemented a “Training Compensation Policy.” Under the  
2 policy, employees would take various types of training but Defendants did not pay for such  
3 training, despite having employees attend such training.

4        Subclass D: Defendants implemented a “Pre-Needs Appointment Policy.” Plaintiffs  
5 contend that under this policy, employees would meet with clients to discuss pre-need  
6 purchases. To the degree that such appointments were not considered part of the employees’  
7 schedule, the employees were suffered or permitted to continue the appointments, but were  
8 not paid for such time worked under the “Pre-Needs Appointment Policy.” Defendants’  
9 management have attempted to justify this policy on the grounds that the employee would  
10 likely receive a commission if the client purchased a pre-needs product.

11        Subclass E: Defendants implemented a “Meal Break Deduction Policy.” Under the  
12 policy, Defendants did not pay for meal breaks but would often have employees perform  
13 work during such meal breaks. Plaintiffs contend that time spent on meal “breaks” was  
14 deducted from the employee’s pay even when Defendants suffered or permitted work to be  
15 performed during such “breaks.”

16        Subclass F: Defendants implemented a “Pre-Approval for Overtime Pay  
17 Policy.” Under this policy, Plaintiffs assert that Defendants only permitted payments for  
18 overtime if the overtime was pre-approved.

19        Subclass G: Defendants implemented an “Unrecorded Work Time Policy.” Under  
20 this policy, Plaintiffs contend that employees performed work but their hours were not  
21 recorded. Plaintiffs claim that Defendants then refused to pay for the time worked under the  
22 “Unrecorded Work Time Policy” because, even though Defendants knew such time had been  
23 worked, it had not been “recorded.”

24        Subclass H: Defendants’ policy was to not include all remuneration (such as bonuses  
25 and commissions) in the calculation of Plaintiffs’ overtime.

26        Plaintiffs further contend that Defendants failed to make, keep and preserve adequate  
27 and accurate records of the employment of Plaintiffs concerning their wages, hours and other  
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1 conditions of employment. More specifically, the records kept by defendants failed to  
2 adequately and accurately disclose among other things, hours worked each work day, the  
3 total hours worked each work week and/or the total overtime compensation for each work  
4 week.

5 In addition, Plaintiffs assert that Defendants devised, intended to devise, and carried  
6 out a scheme to cheat Plaintiffs out of their property and to convert Plaintiffs' property,  
7 including their wages and/or overtime pay. Plaintiffs contend that Defendants' scheme  
8 consisted of illegally, willfully and systematically withholding or refusing to pay Plaintiffs  
9 their regular or statutorily required rate of pay for all hours worked in violation of federal  
10 law. In executing or attempting to execute the scheme, Plaintiffs assert that Defendants  
11 repeatedly mailed payroll checks, either directly to Plaintiffs or between Defendants'  
12 business locations. Plaintiffs assert that these mailings occurred on a regular basis and more  
13 than 100 such mailings occurred in the last 10 years.

14 In their Motions to Dismiss, SCI Eastern, SCI Houston, and the Individual Defendants  
15 contend that the Court lacks personal jurisdiction over them. Specifically, these Defendants  
16 claim they are non-residents of the State of Arizona with insufficient minimum contacts with  
17 the state and they have not purposefully availed themselves of the privilege of conducting  
18 activities in the state, such that personal jurisdiction over them cannot be established.

19 In their Motion to Dismiss, SCI, the Cooperative, and SCI Western claim that  
20 Plaintiffs cannot establish liability against them under the FLSA. SCI claims that it is a  
21 holding company with no employees, and therefore it is not liable under the FLSA.  
22 Similarly, the Cooperative and SCI Western claim that Plaintiffs have not alleged sufficient  
23 allegations to maintain an FLSA claim against them. These Defendants, along with the Plan,  
24 also claim that Plaintiffs' ERISA claims should be dismissed because they are "entirely  
25 dependent upon [Plaintiffs] FLSA claims and thus are unripe unless and until Plaintiffs first  
26 establish an FLSA violation. In addition, these Defendants claim that Plaintiffs' RICO  
27 claims should be dismissed because Plaintiffs' mail fraud allegations are entirely predicated  
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on purported violations of wage and hour laws, which, Defendants claim, the Ninth Circuit has held cannot be maintained based on a failure to pay overtime. These Defendants also claim that Plaintiffs cannot maintain their Rule 23 class action allegations regarding their ERISA and RICO claims because the Rule 23 opt-out class is incompatible with Plaintiffs' proposed FLSA § 216(b) opt-in class, and Plaintiffs' ERISA and RICO claims are dependent upon finding an FLSA violation. In the same Motion to Dismiss, the Plan asserts that it should be dismissed because Plaintiffs have failed to assert a claim against it. Finally, SCI also argues that it should be dismissed for lack of personal jurisdiction.

## DISCUSSION

### I. PERSONAL JURISDICTION

#### A. LEGAL STANDARD – RULE 12(B)(2)

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a defendant may move to dismiss for lack of personal jurisdiction. The plaintiff then bears the burden of demonstrating that jurisdiction exists. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). The plaintiff “need only demonstrate facts that if true would support jurisdiction over the defendant.” Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995); Fields v. Sedgwick Assoc. Risks, Ltd., 796 F.2d 299, 301 (9th Cir. 1986). Uncontroverted allegations in the complaint must be taken as true. AT&T v. Campagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996). However, the court may not assume the truth of such allegations if they are contradicted by affidavit. Data Disc, Inc. V. Systems Technology Associates, Inc., 557 F.2d 1280, 1284 (9th Cir. 1977). Conflicts in the evidence must be resolved in the plaintiff's favor. AT&T, 94 F.3d at 588.

If the material facts are controverted or if the evidence is inadequate, a court may permit discovery to aid in determining whether personal jurisdiction exists. Data Disc, Inc., 557 F.2d at 1285 n.1. If the submitted materials raise issues of credibility or disputed questions of fact, the district court has the discretion to hold an evidentiary hearing in order to resolve the contested issues. Id.

1        There are two independent limitations on the court's power to exercise personal  
2 jurisdiction over a non-resident defendant: the applicable state personal jurisdiction rule and  
3 constitutional principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir.  
4 1990); Data Disc, Inc., 557 F.2d at 1286. Arizona's jurisdictional statute is co-extensive with  
5 federal due process requirements; therefore, jurisdictional inquiries under state law and  
6 federal due process standards merge into one analysis. Arizona's long-arm statute provides  
7 for personal jurisdiction to the extent permitted by the Due Process Clause of the United  
8 States Constitution. Ariz. R. Civ. P. 4.2(a); see also Uberti v. Leonardo, 181 Ariz. 565, 569,  
9 892 P.2d 1354, 1358, cert. denied, 516 U.S. 906 (1995) (stating that under Rule 4.2(a),  
10 "Arizona will exert personal jurisdiction over a nonresident litigant to the maximum extent  
11 allowed by the federal constitution").

12        The exercise of jurisdiction over a non-resident defendant violates the protections  
13 created by the due process clause unless the defendant has "minimum contacts" with the  
14 forum state such that the exercise of jurisdiction "does not offend traditional notions of fair  
15 play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316, 66  
16 S.Ct. 154 (1945). Personal jurisdiction may be either general or specific.

17        General jurisdiction exists where the defendant's contacts with the forum state are so  
18 substantial or continuous and systematic that jurisdiction exists even if the cause of action  
19 is unrelated to those contacts. Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d  
20 1082, 1086 (9th Cir. 2000). The standard for establishing general jurisdiction is "fairly  
21 high." Id.; Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986). The defendant's  
22 contacts must approximate physical presence in the forum state. Schwarzenegger, 374 F.3d  
23 at 801.

24        Specific jurisdiction exists where the cause of action arises out of or relates to a  
25 defendant's activities within the forum. Data Disc, Inc., 557 F.2d at 1286. Specific  
26 jurisdiction is analyzed using a three-prong test: (1) the non-resident defendant must  
27 purposefully direct its activities or consummate some transaction with the forum or a resident  
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1 thereof; or perform some act by which it purposefully avails itself of the privilege of  
2 conducting activities in the forum, thereby invoking the benefits and protections of its laws;  
3 (2) the claim must be one which arises out of or results from the defendant's forum-related  
4 activities; and (3) the exercise of jurisdiction must be reasonable. Lake v. Lake, 817 F.2d  
5 1416, 1421 (9th Cir. 1987). Each of these conditions is required for asserting jurisdiction.  
6 Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981).

7 A showing that a defendant "purposefully availed" itself of the privilege of doing  
8 business in a forum state typically consists of evidence of the defendant's actions in the  
9 forum, such as executing or performing a contract there. Schwarzenegger, 374 F.3d at 802.  
10 The requirement of purposeful availment ensures that the defendant should reasonably  
11 anticipate being haled into the forum state court based on its contacts. World-Wide  
12 Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559 (1980). The purposeful  
13 availment test is met where "the defendant has taken deliberate action within the forum state  
14 or if he has created continuing obligations to forum residents." Ballard, 65 F.3d at 1498.

15 The second prong of the specific jurisdiction test requires that the claim arise out of  
16 or result from the defendant's forum-related activities. A claim arises out of a defendant's  
17 conduct if the claim would not have arisen "but for" the defendant's forum-related contacts.  
18 Panavision Int'l v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

19 Once the plaintiff has satisfied the first two prongs, the defendant bears the burden of  
20 overcoming a presumption that jurisdiction is reasonable by presenting a compelling case  
21 that specific jurisdiction would be unreasonable. Burger King Corp. v. Rudzewicz, 471 U.S.  
22 462, 472-73, 105 S.Ct. 2174 (1985); Haisten v. Grass Valley Medical Reimbursement Fund,  
23 Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986). Seven factors are considered in assessing whether  
24 the exercise of jurisdiction over a non-resident defendant is reasonable: (1) the extent of the  
25 defendant's purposeful interjection into the forum state's affairs, (2) the burden on the  
26 defendant, (3) conflicts of law between the forum state and the defendant's home jurisdiction,  
27 (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial  
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1 resolution of the dispute, (6) the plaintiff's interest in convenient and effective relief, and (7)  
2 the existence of an alternative forum. Caruth v. International Psychoanalytical Ass'n, 59 F.3d  
3 126, 128 (9th Cir. 1995); Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1991).

4 A defendant may move, prior to trial, to dismiss the complaint for lack of personal  
5 jurisdiction. Fed.R.Civ.P. 12(b)(2). The mode of its determination is left to the trial court.  
6 See Gibbs v. Buck, 307 U.S. 66, 71-72 (1939). The limits the district judge imposes on the  
7 pre-trial proceedings will affect the burden the plaintiff is required to meet. Data Disc, 557  
8 F.2d at 1285. For example, if the court requires only affidavits or affidavits and discovery  
9 materials, then a plaintiff must make only a prima facie showing of jurisdiction to overcome  
10 a defendant's motion to dismiss. Id. (citation omitted).

11 This is not to say that a prima facie showing alone guarantees a trial on the merits.  
12 If the materials received by the court reveal controverted questions of fact and issues of  
13 credibility bearing on the jurisdictional question, the court may, in its discretion, resolve the  
14 disputed issues with the aid of additional evidence taken at a preliminary hearing. Id. at  
15 1285. At that time, the plaintiff is required to establish jurisdiction by a preponderance of  
16 the evidence. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936).

## 17 **B. ANALYSIS**

18 SCI Eastern, SCI Houston, and the Individual Defendants have moved to dismiss the  
19 case against them arguing that this Court lacks personal jurisdiction over them because they  
20 have essentially no contact with the State of Arizona and have done nothing to avail  
21 themselves of any rights or benefits accorded under Arizona law. Further, these Defendants  
22 assert that they have not attempted to or consummated any business in the state, nor have  
23 they initiated litigation or otherwise sought the benefits or protections of the laws of the state.  
24 Finally, these Defendants contend they have not been regularly present in the state for any  
25 purpose. These Defendants argue, therefore, the purposeful availment prong has not been  
26 met and the Court cannot exercise jurisdiction over them.

1 The Plaintiffs concede that this Court lacks general jurisdiction over SCI Eastern, SCI  
2 Houston, and the Individual Defendants.

3 Regarding specific jurisdiction, Plaintiffs contend that Defendants purposefully  
4 directed activities within the State of Arizona. Plaintiffs assert that the Court should consider  
5 the substance, rather than the forum, of the activities alleged in determining personal  
6 jurisdiction. See Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d  
7 1392, 1398 (9th Cir. 1986). Plaintiffs claim that wage and hour cases, like the instant case,  
8 warrant consideration of the effects of Defendants' conduct as opposed to the location where  
9 that conduct occurred. See El-Hakem v. BJJ, Inc., 2001 WL 34043760 at \*3 (D. Or. August  
10 15, 2001) (purposeful availment "is satisfied when the defendant is alleged to have engaged  
11 in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the  
12 forum state"); Chao v. Benitez Drywall, LLC, 2007 WL 781760 at \*4 (S.D. Tex. 2007)  
13 (using the quality and nature of a nonresident's contacts with the forum state, rather than the  
14 number of contacts, in determining specific jurisdiction).

### 15 1. SCI EASTERN AND SCI HOUSTON

16 SCI Eastern and SCI Houston claim that Plaintiffs cannot prove any of the facts  
17 required for this Court to assert personal jurisdiction over them. Defendants contend that  
18 Plaintiffs have proffered no evidence that either SCI Eastern or SCI Houston were involved  
19 in creating, adopting, or enforcing any of the employment policies complained of in  
20 Plaintiffs' Complaint.

21 In support of their position, Defendants point to the declarations of Robert Pisano and  
22 Jane Petteway filed in support of SCI Eastern and SCI Houston, which state that SCI Eastern  
23 and SCI Houston: (1) never entered into any contracts, employment or otherwise, with any  
24 of the Plaintiffs in this action; (2) never employed or supervised the employment of any of  
25 the Plaintiffs; and (3) never provided any management, administrator, counting, data  
26 processing, or human resource services within the State of Arizona or to any business entity  
27 doing business in the State of Arizona.

In an effort to contradict Defendants' declarations, Plaintiffs cite the declaration of Judith M. Marshall filed in the case of Prise et al. V. Alderwoods Group Inc., et al., (W.D.Pa. No. 06-1641), now pending in the Western District of Pennsylvania. Plaintiffs cite Ms. Marshall's declaration as stating that "the three SCI Support Centers,<sup>1</sup> together, provide 'all . . . human resources services' at defendants' locations." Pls' Resp. at 4:22. However, Plaintiffs have provided this quote out of context, quoting only a snippet of Ms. Marshall's declaration, and giving a skewed impression of her actual statement. In fact, Ms. Marshall declared, in pertinent part, as follows:

[The] day-to-day human resources and support for individual locations are provided by three separate companies – SCI Eastern Market Support Center, L.P., SCI Western Market Support Center, Inc., and SCI Houston Market Support Center, L.P. Each of these entities has a Management Services Agreement *with the locations in their region of the country* that states that they will provide all executive, management, administrative, accounting, data processing, and human resources services *for the locations*.

Complaint, Appendix B – Judith M. Marshall dec. ¶ 4 (emphasis added). Thus, Ms. Marshall's declaration does not support that all three SCI Support Centers provide human resources for all employees country-wide as Plaintiffs contend.

Plaintiffs further assert that SCI Eastern and SCI Houston, along with SCI Western, employ a "single line management model to streamline the organization and ensure operational efficiencies," by which SCI Eastern and SCI Houston, along with SCI Western, would have purposefully directed activities into the state by managing employees here. Compl. ¶ 45. However, Plaintiffs provide no citation for this statement. Moreover, even if Plaintiffs' assertion is true, based on the evidence presented, a single line management model most likely would originate with the Cooperative and, with regard to this jurisdiction, would carry through to SCI Western. In fact, Ms. Marshall's declaration quoted above

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<sup>1</sup> The "SCI Support Centers" refers to SCI Western, SCI Eastern, and SCI Houston.

1 demonstrates that each regional SCI has a management services agreement with the locations  
2 in that region.

3 Plaintiffs point to other allegations in the Complaint that, they claim, demonstrate that  
4 SCI Eastern and SCI Houston have purposefully directed activities within the forum state.  
5 For example, Plaintiffs allege that the SCI Support Centers provide on-sight training (Compl.  
6 at ¶41), nationwide training (Id. at ¶43), a newsletter and intranet site through which  
7 defendants communicate with their nationwide employees (Id. at ¶43), benefit plans for  
8 employees (Id. at ¶43), a payroll department (Id. at ¶44), and centralized employment records  
9 and payroll information (Id. at ¶44), along with a “centralized management.” Plaintiffs  
10 contend that these services coupled with SCI’s “single line management model,” establish  
11 SCI Eastern and SCI Houston’s activities in the forum state.

12 However, Plaintiffs have misconstrued these claims from Defendants’ declarations.  
13 For example, Plaintiffs cite Ms. Marshall’s declaration when claiming that SCI Support  
14 Centers provide on-sight training, but Ms. Marshall’s declaration actually states that field  
15 personnel and training departments affiliated *with the various human resources providers* at  
16 each of the field locations provide on-sight training. Compl., App. B – Judith M. Marshall  
17 Decl. at ¶6. Regarding nationwide training, Plaintiffs refer to “Dignity University training  
18 programs,” which are provided by the Cooperative, not SCI Eastern or SCI Houston.  
19 Regarding the newsletter and intranet site to which Plaintiffs refer, the weekly newsletter  
20 “Frontline,” is published by the Cooperative. Likewise, the “Global Village” intranet site  
21 also is operated and maintained by the Cooperative. Id. at ¶ 7. Similarly, benefit plans are  
22 administered by the Cooperative. Compl., App. C – Gwen Petteway Decl. at ¶ 5. Finally,  
23 with respect to the employment records and payroll information, Plaintiffs cite the  
24 Declaration of Liana Jensen. Ms. Jensen states that in relation to Prise v. Alderwoods Group,  
25 Inc. et al., she contacted the payroll departments of both Alderwoods Group, Inc. and the  
26 Cooperative. Compl., App. D – Liana Jensen Decl. at ¶ 3. Ms. Jensen also states that she  
27 accessed a database with current and former employees of SCI subsidiaries. Id. Ms. Jensen  
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1 does not directly state who controls this database but in the very next sentence, she states that  
2 she asked a senior data analyst at the Cooperative to perform databases searches of  
3 employees. Id. Thus, it appears that the Cooperative controls the employee database. It also  
4 appears that Plaintiffs' references and attempts to establish that SCIEastern and SCIHouston  
5 have some connection to Arizona are insufficient to establish specific personal jurisdiction.  
6 Moreover, Defendants have provided W-2s for the named Plaintiffs employed in Arizona  
7 showing that they are employed by the Cooperative, which has not filed a motion to dismiss.  
8 Thus, Plaintiffs have not met the first prong of the test to establish specific jurisdiction as to  
9 SCI Eastern and SCI Houston. Accordingly, SCI Eastern and SCI Houston's Motion to  
10 Dismiss is granted.

## 11                   2.       INDIVIDUAL DEFENDANTS

12           The Individual Defendants claim that they have not purposefully directed conduct into  
13 the forum state, or a resident thereof, without which, they are not subject to personal  
14 jurisdiction here.

15           Plaintiffs claim that each Individual Defendant has directed activity into the forum  
16 state through the operation of their employment. Plaintiffs contend that the Individual  
17 Defendants have made no attempt to deny or even address the allegations in the Complaint  
18 that they are subject to specific jurisdiction here; nor have they attempted to deny that they  
19 are Plaintiffs' employers. Thus, Plaintiffs assert, this demonstrates the Individual  
20 Defendants' inability to disprove Plaintiffs' jurisdictional assertions.

21           The Individual Defendants have filed the Declaration of Nicholas P. Forestiere in  
22 support of their Motion. In his declaration, Mr. Forestiere, who is an attorney representing  
23 the Individual Defendants, seeks to have the Court take judicial notice of Taghulk  
24 Proprietary, Ltd. et al. v. Service Corp Int'l, Inc. et al., NDCA, No. 99-5151 (2000). In  
25 Taghulk the court in the Northern District of California found that SCI was not subject to  
26 personal jurisdiction in California. However, Taghulk is distinguishable because it pertained  
27 to jurisdiction in California, and because it considered jurisdiction in the context of a patent  
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1 and trademark infringement action; it did not consider jurisdiction with regard to SCI's  
2 employment policies and activities or in the context of a wage and hour lawsuit.

3 In addition, it is relevant to note, as Plaintiffs point out, that the court in Taghulk made  
4 its personal jurisdiction determination after the parties had had an opportunity to conduct  
5 discovery. The parties in the instant case have yet to conduct discovery. If material facts are  
6 controverted or if the evidence is inadequate, a court may permit discovery to aid in  
7 determining whether personal jurisdiction exists. Data Disc, Inc., 557 F.2d at 1285 n.1. If  
8 the submitted materials raise issues of credibility or disputed questions of fact, the district  
9 court has the discretion to hold an evidentiary hearing in order to resolve the contested issues.  
10 Id. As shown below, Plaintiffs have made a *prima facie* showing that Individual Defendants  
11 Jane D. Jones, Gwen Petteway, and Curtis Briggs are subject to personal jurisdiction.  
12 However, the Court directs the parties to conduct discovery as to this Court's exercise of  
13 jurisdiction over Individual Defendants Thomas Ryan and Julie Douglas.

14 **a) JANE JONES**

15 In her declaration, Jane Jones states that she is a resident of Houston, Texas and works  
16 as Vice President of Human Resources for SCI. Ms. Jones states that at no time has she  
17 "hired, terminated, or supervised any of the plaintiffs nor any other employees of any funeral  
18 establishment, cemetery or other local facility that is owned by a subsidiary of Service  
19 Corporation International, including any such funeral establishments, cemeteries or other  
20 local facilities located in the State of Arizona." Declaration of Jane D. Jones ¶ 12. Ms. Jones  
21 further states that she has not had minimum contacts with the state. Id. at ¶¶ 3-12.  
22 Therefore, Ms. Jones argues that she is not subject to specific jurisdiction here.

23 Plaintiffs contend that as Vice President of Human Resources for SCI, Ms. Jones, has  
24 directed activities within this forum by "oversee[ing] human resources, training and  
25 education, and payroll and commission services – activities that assist approximately 20,000  
26 employees in North America." Compl. ¶ 142. Plaintiffs have alleged that Ms. Jones is  
27 "responsible for, provides direction and control over, and is authorized to direct all aspects  
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1 of human resources functions across SCI's network." Compl. ¶ 143. Plaintiffs have further  
2 alleged that Ms. Jones is actively involved in the creation of the wage and hour policies at  
3 issue in this lawsuit, including the "On Call Pay Policy, Community Work Policy Training  
4 Compensation Policy, Pre-Needs Appointment Policy, Meal Break Deduction Policy, Pre-  
5 Approval for Overtime Pay Policy, Unrecorded Work Time Policy, and the policy regarding  
6 the calculation of Plaintiffs' overtime." Compl. ¶ 144.

7        Though Ms. Jones contends that she has not hired, terminated, or supervised the SCI  
8 employees involved in this lawsuit, nor any other employees of SCI, including SCI locations  
9 in Arizona, she has not contested the allegations that she is actively involved in the policies  
10 that affect these employees. As stated above, uncontroverted allegations in the complaint  
11 must be taken as true. AT&T, 94 F.3d at 588. Conflicts in the evidence must be resolved  
12 in the plaintiff's favor. Id. Thus, through Ms. Jones' asserted involvement with the human  
13 resources policies affecting SCI employees across the country, including Arizona, Plaintiffs  
14 have met the "purposeful availment" prong of the Lake test. See Lake, 817 F.2d at 1421.

15        Regarding the second prong of the test – "arising out of" or resulting from the  
16 Defendant's forum-related activities – applying the Panavision Int'l "but-for" test, the  
17 question is but for Ms. Jones' involvement with the policies affecting Arizona SCI  
18 employees, would Plaintiffs' claims have arisen? See Panavision, 141 F.3d at 1316. Based  
19 on Plaintiffs' assertion in their Complaint that Ms. Jones "oversees human resources . . . that  
20 assist approximately 20,000 employees" (Compl. at ¶ 142), the answer is no.

21        Finally, the third prong of the Lake test requires that jurisdiction be reasonable. See  
22 Lake, 817 F.2d at 1421. The Individual Defendants have the burden to establish that this  
23 Court's exercise of jurisdiction over them would not be reasonable. Defendants argue that  
24 it would be "manifestly unreasonable" to require them to defend themselves "in a distant  
25 forum with which they have clearly had no contact." Defs' Reply at p. 7. However, in light  
26 of Ms. Jones' position and her responsibilities within the Company, she has not established  
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1 that exercising jurisdiction over her here would be unreasonable. Accordingly, Ms. Jones'  
2 Motion to Dismiss is denied.

3 **b) GWEN PETTEWAY**

4 Gwen Petteway is a resident of Brazoria County, Texas and is employed by the  
5 Cooperative as a director of human resources. Compl. Appendix C. In her Declaration, Ms.  
6 Petteway states that in performing her job she works with the SCI Houston Market Support  
7 Center in Houston and does not have minimum contacts with the State of Arizona. Def's  
8 Response, Exh. 5, at p. 2. Therefore, Ms. Petteway argues, she should not be subject to  
9 personal jurisdiction here.

10 Plaintiffs assert that Gwen Petteway directed activities with this forum state through  
11 her job responsibilities, which include familiarity "with the human resources services of the  
12 subsidiary and affiliate company of SCI, as well as training and benefits provided by those  
13 companies." Compl. ¶ 166. Further, Plaintiffs claim that Ms. Petteway has admitted that,  
14 as Human Resources Director, her job responsibilities include "day-to-day human resources  
15 services and support for [defendants'] funeral home locations." Compl. ¶ 167.

16 Though Ms. Petteway claims that she has not hired, terminated, or supervised the SCI  
17 employees involved in this lawsuit, she has stated that she is the director of human resources  
18 for SCI Houston and that day-to-day human resources services are provided in part by SCI  
19 Houston. Compl., Appendix C. Ms. Petteway also has stated that the Cooperative, for whom  
20 she is employed, creates and distributes employee handbooks or manuals and that the  
21 Cooperative administers benefit plans. Id. As a director of human resources, employed by  
22 the Cooperative, it appears that Ms. Petteway is subject to personal jurisdiction here.

23 The second prong of the test is also satisfied because but for Ms. Petteway's actions  
24 as director of human resources employed by the Cooperative, these claims would not have  
25 arisen. See Panavision, 141 F.3d at 1316.

1 Finally, in light of the allegations against Ms. Petteway and her position in the  
2 Company, Ms. Petteway has not established that the exercise of jurisdiction over her would  
3 be unreasonable. Accordingly, Ms. Petteway's Motion to Dismiss is denied.

4 **c) THOMAS RYAN**

5 Thomas Ryan is a resident of Houston, Texas. Mr. Ryan is an employee of SCI  
6 Executive Services, Inc., and serves in the position of President and Chief Executive Officer  
7 of SCI. In his declaration, Mr. Ryan claims not to have any ownership interest in any of the  
8 funeral establishments, cemeteries and other local facilities owned by a subsidiary of SCI.  
9 Decl. of Thomas Ryan ¶ 3. Mr. Ryan further claims not to have minimum contacts with the  
10 state. Id. at ¶¶ 4-12. Therefore, Mr. Ryan claims not to be subject to personal jurisdiction  
11 here.

12 Plaintiffs assert that Mr. Ryan directed activities within the forum state by acting as  
13 President and Chief Executive Officer of SCI and by actively managing SCI and the SCI  
14 network, including those activities related to Defendants' employment-related policies and  
15 decisions. Compl. ¶¶ 191-92.

16 As President and Chief Executive Officer of SCI and by virtue of this position, it  
17 appears that Mr. Ryan may have a role in affecting employment related policies within the  
18 SCI network of companies. In fact, in contrast to the other Individual Defendants' affidavits,  
19 Mr. Ryan's affidavit omits the statement that he has not participated in hiring, termination,  
20 or supervision of Plaintiffs or other employees in Arizona. However, the allegations about  
21 Mr. Ryan in Plaintiffs' Complaint are based either on information and belief or on Mr.  
22 Ryan's authority due to his position. Thus, the Court finds it appropriate to require discovery  
23 as to Mr. Ryan's alleged involvement in the alleged claims. See Data Disc, Inc., 557 F.2d  
24 at 1285 n.1 (stating that if the evidence of one's personal jurisdiction is inadequate, a court  
25 may permit discovery to aid in determining whether personal jurisdiction exists).

26 ///

27 ///

**d) CURTIS BRIGGS**

Curtis Briggs is a resident of Houston, Texas and serves as senior corporate counsel for the Cooperative. Defs' Mot. to Dismiss, Exh. 1, at p. 2. In his declaration, Mr. Briggs asserts that he has never actively managed any funeral establishment, cemetery or other facility for SCI in Arizona. Id. Mr. Briggs also states that at no time has he hired, terminated, or supervised any of the Plaintiffs or other employee of SCI or an SCI subsidiary located in Arizona. Id.

Plaintiffs contend that Curtis Briggs has directed activities within this forum through his involvement with SCI-affiliated entities, including that Mr. Briggs makes decisions concerning SCI affiliates' employment-related policies pertaining to human resources, training, payroll, and benefits. Resp. at p. 6; Compl. at ¶ 221.

Mr. Briggs claims not to have "actively managed" any SCI subsidiary in Arizona nor to have hired, terminated, or supervised Plaintiffs or any employee of SCI or SCI subsidiary employee in Arizona. However, Mr. Briggs does not claim that his work with employment-related policies pertaining to human resources, training, payroll, and benefits for SCI affiliates have not affected Plaintiffs or other SCI or SCI subsidiary employees. As senior corporate counsel with authority to make employment-related policies, it appears Mr. Briggs has purposefully directed activities into this state.

Second, Plaintiffs have established that but for Mr. Briggs' employment-related policy decisions, Plaintiffs would not have filed the instant lawsuit.

Finally, based on all of the information presented Mr. Briggs has not established that the exercise of jurisdiction over him would be unreasonable. Accordingly, Mr. Briggs is subject to personal jurisdiction here.

**e) JULIE DOUGLAS**

Finally, Julie Douglas resides in Houston, Texas and serves as an employee benefits manager for the Cooperative. In her Declaration, Ms. Douglas states that she is not, nor has

1 she ever been, the Plan Administrator for the SCI 401K Pension Plan. Defs' Motion to  
2 Dismiss, Exh. 2 (Doc. 54-2).

3 Plaintiffs contend that Julie Douglas has directed activities within this forum through  
4 her administration of the Defendant SCI 401K Retirement Savings Plan (the "Plan") (Compl.  
5 ¶ 33), in which Plaintiffs – including Arizona residents – are or were eligible to participate  
6 (Compl. ¶ 31).

7 Ms. Douglas claims not to be the Plan administrator, whereas Plaintiffs assert that she  
8 is the Plan administrator. As stated above, if material facts are controverted, a court may  
9 permit discovery to aid in determining whether personal jurisdiction exists. Data Disc, Inc.,  
10 557 F.2d at 1285 n.1. Thus, the Court finds it appropriate to require discovery as to Ms.  
11 Douglas' position at the Cooperative and what, if any, work she does or has done with the  
12 Plan.

13 **I. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE**  
14 **GRANTED – RULE 12(B)(6) ASSERTION**

15 **A. LEGAL STANDARD**

16 A motion to dismiss for failure to state a claim will be denied unless it is "clear that  
17 no relief could be granted under any set of facts that could be proved consistent with the  
18 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th Cir. 2002), citing  
19 Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). A complaint must contain a "short and  
20 plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).  
21 "Each averment of a pleading shall be simple, concise, and direct. No technical forms of  
22 pleading or motions are required." Fed.R.Civ.P. 8(e). These rules "do not require a claimant  
23 to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules  
24 require is 'a short and plain statement of the claim' that will give the defendant fair notice  
25 of what the plaintiff's claim is and the grounds on which it rests." Conley v. Gibson, 355  
26 U.S. 41, 47 (1957).

27 ///

1           **B.     FLSA CLAIM**

2           Under the FLSA plaintiffs may maintain claims only against “employers” for whom  
3 they worked as “employees.” See 29 U.S.C. § 216(b) (an action to recover for unpaid  
4 overtime compensation under the FLSA may be “maintained against any employer . . . by  
5 any one or more employees . . . .”

6           Defendant SCI as a holding company and Defendants the Cooperative, SCI Western,  
7 and the Plan (the “Corporate Defendants”), move to dismiss the FLSA claim arguing that  
8 Plaintiffs cannot establish that they are Plaintiffs’ employer or Plaintiffs’ joint employer.<sup>2</sup>  
9 In support of their position, Defendants cite Benshoff v. City of Virginia Beach, 180 F.3d  
10 136, 140 (4th Cir. 1999) and Choe-Rively v. Vietnam Veterans of Am., 135 F.Supp. 2d 462  
11 470 (D. Del. 2001). However, neither Benshoff nor Choe-Rively are precedent here.  
12 Furthermore, both Benshoff and Choe-Rively discuss FLSA claims in the context of  
13 summary judgment.

14           Defendants spend a substantial portion of their Motion discussing litigation between  
15 these same parties in the Western District of Pennsylvania. Defendants’ discussion includes  
16 citations and quotations in the Pennsylvania proceedings. The Corporate Defendants’ main  
17 argument appears to be that this Court should dismiss the FLSA claim against them because  
18 the Western District of Pennsylvania court did not allow an FLSA claim to proceed there.  
19 However, not only are the Pennsylvania hearings outside the pleadings, they also have no  
20 precedential authority here.

21           In contrast, Plaintiffs assert that their FLSA claim should not be dismissed because  
22 the Corporate Defendants are Plaintiffs’ employers. Plaintiffs contend, at the motion to  
23 dismiss stage Plaintiffs are not required to conclusively prove Defendants’ employer status.

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24  
25           <sup>2</sup> In a footnote to their Motion to Dismiss, SCI Eastern and SCI Houston state that  
26 they join this Motion. However, because the Court dismissed SCI Eastern and SCI Houston  
27 for lack of personal jurisdiction, the Court will not consider them with regard to the Motion  
28 to Dismiss the FLSA claim.

1 Rather, at this stage, Plaintiffs contend, they are only required to provide Defendants  
2 adequate notice of the claims against them and the grounds for those claims.

3 In support of their FLSA claim, Plaintiffs also refer to the declarations submitted in  
4 the Pennsylvania litigation and attached to their Complaint in which SCI stated that its  
5 human resources and employment functions are the responsibility of SCI Western, SCI  
6 Eastern, SCI Houston, and the Cooperative.

7 The FLSA broadly defines the “employer-employee relationship[s]” subject to its  
8 reach. Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947). “‘Employ’ includes  
9 to suffer or permit to work.” 29 U.S.C. § 203(g). “‘Employer’ includes any person acting  
10 directly or indirectly in the interest of an employer . . . .” Id. § 203(d). The FLSA’s  
11 definition of employee has been called the “‘broadest definition that has ever been included  
12 in any one act.’” United States v. Rosenwasser, 323 U.S. 360, 363 n. 3 (1945) (quoting 81  
13 Cong.Rec. 7,657 (1938) (statement of Sen. Black)).

14 Regulations promulgated under the FLSA recognized that an employee may have  
15 more than one employer under the FLSA. 29 C.F.R. § 791.2 (“A single individual may stand  
16 in the relation of an employee to two or more employers at the same time . . . .”). When more  
17 than one entity is an employer for purposes of the FLSA, the entities are termed “joint  
18 employers.” Id. The Ninth Circuit has specified that whether an entity is an employer under  
19 the FLSA is a question of law that must be determined by applying the economic reality test.  
20 Torres-Lopez v. May, 111 F.3d 633, 638, 639 (9th Cir. 1997) (citing Bonnette v. California  
21 Health and Welfare Agency, 704 F.2d 1465, 1469, 1470 (9th Cir. 1983); Real v. Driscoll  
22 Strawberry Associates, Inc., 603 F.2d 748, 754 (9th Cir. 1979)). Under the economic reality  
23 test, a court must “consider the totality of the circumstances of the relationship, including  
24 whether the alleged employer has the power to hire and fire the employees, supervises and  
25 controls employee work schedules or conditions of employment, determines the rate and  
26 method of payment, and maintains employment records.” Hale v. State of Arizona, 993 F.3d  
27 1387, 1394 (9th Cir. 1993) (citing Bonnette, 704 F.2d at 1470).

1 Defendants cite Singh v. 7-Eleven, Inc., 2007 WL 715488 at \*3 (N.D. Cal. Mar. 8,  
2 2007), which states that to be a joint employer, a defendant must have operational control  
3 over the plaintiffs' work, such as the "power to hire and fire the employees, supervise[] and  
4 control[] employee work schedules or conditions of employment, determine[] the rate and  
5 method of payment, and maintain[] employment records." However, the order in Singh was  
6 issued at the summary judgment stage of the case. Defendants contend that this distinction  
7 is irrelevant, as Defendants cite it for the criteria for finding two entities joint employers.  
8 However, the Court is not inclined to preclude Plaintiffs from an opportunity to conduct  
9 discovery to discover evidence that meets the criteria expounded in Singh.

10 Defendants cite many documents outside the pleadings in an effort to dismiss the  
11 instant claims against them. However, at the motion to dismiss stage Plaintiffs need only set  
12 forth a "short and plain statement of the claim showing that the pleader is entitled to relief."  
13 Fed.R.Civ.P. 8(a). Defendants cite the recently-decided antitrust case of Bell Atlantic Corp.  
14 v. Twombly, 127 S.Ct. 1955, 1964-65 (2007) (holding that a plaintiff's obligation on a  
15 motion to dismiss is to provide more than "labels and conclusions, and a formulaic recitation  
16 of the elements of a cause of action"), in an effort to argue that Plaintiffs' allegations here  
17 are insufficient. However, Twombly does not apply a new regime whereby plaintiffs must  
18 set forth proof of their claims to overcome a motion to dismiss. Instead, Twombly directs  
19 that a complaint must meet a standard of "plausibility," rather than merely "possibility." Id.  
20 at 1974.

21 During oral argument, Defendants again asserted that Plaintiffs Complaint does not  
22 meet the Twombly standard and point to the November 15, 2007 transcript of a hearing  
23 before the Honorable Joy Flowers Conti, United States District Court for the Western District  
24 of Pennsylvania in Prise et al. v. Alderwoods et al., No. 06-16431 (W.D. Pa. November 15,  
25 2007), in which Judge Conti found that plaintiffs' proposed amended complaint did not meet  
26 the Twombly test there. Judge Conti stated that the plaintiffs' proposed amended complaint  
27 does not allege fact but, rather, it alleged disguised legal conclusions. Defendants stated that  
28



1 this transcript was incorporated in the Complaint. However, this transcript actually was  
2 submitted in the Affirmation in Response to Defendants' Motion to Dismiss or Strike and to  
3 Dismiss Complaint Pursuant to FRCP 12(b)(2) and FRCP 12(b)(6) (Doc. 90). Nevertheless,  
4 the Court considers Defendants' assertion but does not find it compelling. It is the Court's  
5 understanding that Judge Conti did not dismiss the claims in Alderwoods but simply did not  
6 allow plaintiffs there to amend to add the SCI defendants. In addition, although there are  
7 some allegations in the Complaint based on "understanding and belief" the Court finds that  
8 the Complaint does include sufficient facts to meet the Twombly "plausibility" test.

9 Defendants assert that in Plaintiffs' Complaint, they have set forth only very broad-  
10 based conclusions without factual underpinnings, thereby falling short of the Twombly  
11 standard. The Court disagrees with Defendants' interpretation of Plaintiffs' Complaint.  
12 Without determining whether the Twombly pleading standard applies outside of the context  
13 of antitrust cases, the Court finds that Plaintiffs have met the Twombly "plausibility"  
14 requirement. Twombly, 127 S.Ct. at 1974.

### 15 **1. SCI WESTERN**

16 The Complaint alleges sufficient facts to overcome Defendants' Motion to Dismiss  
17 Plaintiffs' FLSA claim as to SCI Western. Specifically, the Complaint alleges, based on  
18 Defendants' sworn admissions which are attached to the Complaint, that the SCI Support  
19 Centers provide "day-to-day human resources services and support for individual locations,"  
20 including "all executive, management, administrative, accounting, data processing, and  
21 human resources services for [Defendants'] locations." Compl. at ¶ 40. In addition,  
22 Plaintiffs complaint alleges that SCI Western provides "Dignity University training  
23 programs," by which Defendants ensure uniform services at nationwide locations, publish  
24 and maintain the weekly newsletter "Frontline," and the "Global Village" intranet site  
25 through which Defendants communicate with their nationwide employees, and administer  
26 benefits plans for employees and contract with third-party benefit providers to respond to  
27 questions related to day-to-day benefits services. Compl. at ¶¶ 42-43. These allegations are

1 sufficient to meet the totality of the economic realities test to overcome the instant Motion  
2 to Dismiss as to SCI Western.

## 3                   **2.       THE COOPERATIVE**

4           The Complaint alleges sufficient facts to overcome Defendants' Motion to Dismiss  
5 Plaintiffs' FLSA claim as to the Cooperative. Specifically, the Complaint cites sworn  
6 declarations the Defendants submitted in the Western District of Pennsylvania litigation and  
7 alleges that the Cooperative provides human resources service and support for the SCI  
8 Support Centers, including SCI Western. Compl. at ¶ 74. The Complaint also alleges that  
9 Defendants have admitted that the field personnel and training departments affiliated with  
10 the Cooperative provide "on-site training at funeral homes and cemeteries." Compl. at ¶ 76.  
11 Further, the Complaint alleges that Defendants have admitted that the Cooperative publishes  
12 and maintains the weekly newsletter "Frontline," and the "Global Village" intranet site,  
13 through which Defendants communicate with their employees nationwide. Compl. at ¶ 77.  
14 Additionally, the Complaint asserts that the Cooperative administers benefits by  
15 "contract[ing] with third-party benefit providers to respond to questions related to day-to-day  
16 benefits services, such as local provider questions, access to online services, and benefits  
17 provider contact information. To the extent that those third-party providers cannot respond  
18 to questions, [the Cooperative] will respond." Compl. at ¶ 78. Finally, the Complaint alleges  
19 that the Cooperative maintains a payroll department and "a database that contains  
20 information on current and former employees of SCI subsidiaries." Compl. at ¶ 79. These  
21 allegations are sufficient to meet the totality of the economic realities test to overcome the  
22 instant Motion to Dismiss as to the Cooperative.

## 23                   **3.       SCI**

24           The Complaint alleges sufficient facts to overcome Defendants' Motion to Dismiss  
25 Plaintiffs' FLSA claim as to SCI. Specifically, Plaintiffs have alleged that SCI and its  
26 affiliates employ "a single line management model in an effort to streamline the organization  
27 and ensure that operational efficiencies [are] achieved throughout the SCI network." Compl.  
28

1 at ¶ 111. The Complaint also alleges, that SCI maintains control and authority over its  
2 affiliate companies and that it oversees human resources and employment functions, such as  
3 hiring and firing employees, supervision and control of work schedules or conditions of  
4 employment, determination of rate and methods of pay, and maintenance of employment  
5 records. Compl. at ¶¶ 113-14, 127-30. These allegations are sufficient to meet the totality  
6 of the economic realities test to overcome the instant Motion to Dismiss as to SCI.

7 The Court finds that Plaintiffs have sufficiently pled their FLSA claim to overcome  
8 Defendants' Rule 12(b)(6) Motion to Dismiss. Accordingly, the Court denies Defendants'  
9 Motion to Dismiss as to Plaintiffs' FLSA claim.

### 10 C. ERISA CLAIMS

11 Defendants assert a number of arguments as to why Plaintiffs' ERISA claims should  
12 be dismissed. First, Defendants argue that Plaintiffs' ERISA claims are unripe because they  
13 are derivative of, and entirely dependent upon, Plaintiffs' FLSA claim, which Plaintiffs have  
14 yet to establish and because they are contingent on future events (the future events as  
15 Defendants present them are the following: (i) Plaintiffs needing to succeed on the merits of  
16 their FLSA claim for overtime and wages; and (ii) a refusal of the Plan Administrator to  
17 approve credits after reviewing claims submitted through the Plan's review procedures).  
18 Second, Defendants argue that Plaintiffs' Section 1132(a)(1)(B) claim fails for failure to  
19 exhaust administrative remedies. Third, Defendants assert that ERISA does not provide for  
20 a private cause of action for a record-keeping.<sup>3</sup> Finally, Defendants argue that Plaintiffs'  
21 breach of fiduciary duty claim fails because Plaintiffs have not established that Defendants  
22 owed Plaintiffs a fiduciary duty.

23 ///

24 ///

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26 <sup>3</sup> Both Defendants' failure to exhaust argument and their record-keeping argument  
27 pertain to Claim II, Plaintiffs' 29 U.S.C. § 1132(a)(3) ERISA claim.

## 1. RIPENESS

Regarding Defendants' ripeness argument, generally there are two prongs to a ripeness inquiry, including the fitness of the issue for judicial decision, and the hardship to the parties. See Abbott Labs v. Gardner, 387 U.S. 136, 149 (1967).

Defendants argue that Plaintiffs' ERISA claims are unripe because they are derivative of, and entirely dependent upon, Plaintiffs' FLSA claim, which Plaintiffs have yet to establish. In support of their position, Defendants cite Texas v. United States, 523 U.S. 296, 300 (1998), which held that a claim is not ripe for adjudication if it rests upon contingent future events. However, in Texas the Court ruled on the issue of whether a Voting Rights Act's pre-clearance provisions could apply to allow sanctions under the Texas Education Code against a local school district if it were to fail to meet state-mandated educational achievement levels. Id. The Court found the issue unripe for adjudication because the Court had "no idea whether or when such [a sanction] will be ordered." Id. Texas is distinguishable because, here, the asserted events giving rise to Plaintiffs' ERISA claims already have allegedly occurred and the only delay in the Court's ability to consider Plaintiffs' ERISA claims is that it must first rule on Plaintiffs' FLSA claim.

Plaintiffs, on the other hand, contend that courts routinely hold that ERISA claims are ripe and fit for review, even when dependent on FLSA claims. In support of their position, Plaintiffs cite In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation, 2005 WL 1972565 (D. Or. Aug. 15, 2005) (stating, "I will hold the two ERISA claims in abeyance and defer any further activity on the claims (including class certification, discovery, summary judgment), until I rule on defendants' liability for overtime pay"), and Rosenburg v. IBM Corp., 2006 WL 1627108 (N.D. Cal. June 12, 2006).

In In re Farmers Ins. Exchange, the court denied the defendants' motion to dismiss the ERISA claims, suggesting that the ERISA claims be deferred until after a ruling on the merits of the overtime liability claims. Id. at \* 5. In Rosenburg the court found plaintiffs' ERISA claims dependent on their FLSA claims but that the dependence of the ERISA claims did not

render plaintiffs' claims unripe. Rosenberg, 2006 WL 1627108 at \*8-9. The court denied the defendant's motion that the ERISA claims were unripe stating that the plaintiffs' ERISA claims were for equitable relief and not for damages that have not yet occurred. Id.

Defendants attempt to distinguish In re Farmers and Rosenberg to no avail. Defendants contend that In re Farmers does not apply here because the defendants did not raise a ripeness argument in their motion to dismiss. However, regardless of the argument set forth in the motion, the court deferred consideration of the ERISA claims pending a ruling on the merits of the FLSA claim. Defendants distinguish Rosenberg by asserting that plaintiffs' ERISA claims there were only for equitable relief and not damages. The Court does not find this distinction merits dismissal of Plaintiffs' ERISA claims here. Plaintiffs ERISA claims are based on damages alleged to have already occurred and not on speculation of future injury. Therefore, the Court is not persuaded by Defendants' ripeness argument.

## 2. EXHAUSTION

Defendants argue that Plaintiffs' Section 1132(a)(1)(B) ERISA claim fails for failure to exhaust administrative remedies. In opposition, Plaintiffs assert that they were not required to exhaust administrative remedies because doing so would have been futile. Thus, Plaintiffs contend, they may proceed under ERISA's "catch-all" provision, 29 U.S.C. § 1132(a)(3).<sup>4</sup> A beneficiary seeking a determination of rights or benefits under a plan must first exhaust the administrative remedies provided by the plan. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980). A district court has discretion to waive the exhaustion requirement, Southeast Alaska Conservation Council v. Watson, 697 F.2d 1305, 1309 (9th Cir. 1983), and should do so when exhaustion would be futile. Amato, 618 F.2d at 568.

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<sup>4</sup> Contrary to Defendants' argument that Plaintiffs have asked the Court to "excuse their mistake" as to their lack of exhaustion, which is required by 29 U.S.C. § 1132(a)(1)(B), Plaintiffs Complaint asserts the ERISA claims under the ERISA catchall provision, 29 U.S.C. § 1132(a)(3), which is used when exhaustion would be futile.

1           The ERISA plan in question compensates employees for hours worked as recorded  
 2 by the Corporate Defendants. Plaintiffs assert that the Corporate Defendants' failed to  
 3 properly account and pay employees for hours they worked, which has resulted in inaccurate  
 4 payroll records from which credits under the Plan are derived. Plaintiffs have based their  
 5 ERISA claims on the Corporate Defendants' alleged failure to properly account and credit  
 6 Plaintiffs for hours worked, therefore, it would be futile to exhaust administrative duties with  
 7 the Plan because the Plan has not received adequate accounting from the Corporate  
 8 Defendants. The Court agrees. It would be futile for Plaintiffs to exhaust administrative  
 9 remedies with the Plan when, Plaintiffs allege, the Plan has not been provided a correct  
 10 record of Plaintiffs hours. See Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412, 1416  
 11 n.1 (9th Cir. 1991) (finding plaintiff not required to take steps to exhaust administrative  
 12 remedies for ERISA claims when such steps would be futile). Accordingly, the Court is not  
 13 persuaded by Defendants' exhaustion argument.

### 14                           **3.       ERISA RECORD KEEPING PROVISION**

15           Next, Defendants assert that Plaintiffs' record keeping claim fails because the ERISA  
 16 record-keeping provision does not provide a private cause of action. In response, Plaintiffs  
 17 cite Farmers, 2005 WL 1972565 at \*3 (citations omitted), to assert that ERISA's civil  
 18 enforcement provision, 29 U.S.C. § 1132(a)(3), provides plan participants the right to seek  
 19 civil remedy for any violation of ERISA, including record-keeping violations. As pointed  
 20 out in Farmers, the catchall provision of 29 U.S.C. § 1132(a)(3) provides in relevant part that

21           A civil action may be brought -

22           \* \* \*

23           (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice  
 24 which violates any provision of this title or the terms of the plan, or (B) to  
 25 obtain other appropriate equitable relief (i) to redress such violations or (ii) to  
 26 enforce any provisions of this title or the terms of the plan . . . .

27           29 U.S.C. § 1132(a)(3).

1 “Thus, Section 1132(a)(3) confers on plan participants the right to bring suit to enjoin  
 2 “any” violation of “this title.” “This title” is Title I, which encompasses 29 U.S.C. §§ 1001  
 3 through 1191, including the record-keeping requirements of § 1059(a).” Farmers, 2005 WL  
 4 1972565 at \* 3. Accordingly, Defendants’ argument as to Plaintiffs’ record-keeping claim  
 5 in not compelling; Defendants’ Motion to Dismiss Claim II is denied. Nevertheless, the  
 6 Court will hold in abeyance Plaintiffs’ record-keeping claim pending the outcome of  
 7 Plaintiffs’ FLSA claim.

#### 8 **4. DEFENDANTS’ DUTY**

9 Finally, Defendants argue that Plaintiffs’ breach of fiduciary duty claim fails because  
 10 Plaintiffs have not first established that Defendants had a duty to credit Plaintiffs’ ERISA  
 11 plans for hours Plaintiffs have worked. Essentially, it appears that Defendants assert that  
 12 ERISA does not govern their decisions about how to administer payroll and that ERISA’s  
 13 fiduciary duties apply only to a company’s actions with respect to its employee benefit plan,  
 14 and not its roll as an employer.

15 In contrast, Plaintiffs contend that Defendants had a fiduciary duty under ERISA to  
 16 ensure that Plaintiffs were paid in accordance with the FLSA but that this analysis is  
 17 premature and inappropriate on a motion to dismiss because discovery is necessary to  
 18 determine the extent of Defendants’ fiduciary duty.<sup>5</sup>

19 In support of their position, Defendants cite Ballaris v. Wacker Siltronic Corp., 2002  
 20 WL 926272 (D.Or. February 7, 2002), and Veliz v. Cintas Corp., 2003 WL 23857822 (N.D.  
 21 Cal. November 4, 2003). In Ballaris the court found that the employer’s decision concerning  
 22 whether to pay wages for time employees spent preparing to work had “only an extremely  
 23 indirect connection to the administration of the ERISA plan” and, therefore, did not give rise  
 24 to a fiduciary duty under the plan. Ballaris , 2002 WL 926272 at \*2. In Veliz the court

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25  
 26 <sup>5</sup> As stated above, Plaintiffs assert that the Corporate Defendants’ failed to properly  
 27 account and pay employees for hours they worked, which has resulted in inaccurate payroll  
 28 records from which credits under the Plan are derived.



1 dismissed plaintiffs' breach of fiduciary duty claim under ERISA, finding the decision of  
2 whether to characterize plaintiffs as non-hourly employees, rather than hourly employees,  
3 and thereby not keep record of plaintiffs' hours worked was a business decision and does not  
4 equate to a breach of fiduciary duty. Id. at \*5.

5 Under ERISA, crediting hours is a fiduciary function, independent of the payment of  
6 wages, necessary to determine participants' participation, vesting and accrual of rights. See,  
7 e.g., Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (distinguishing between fiduciary  
8 and settlor functions). As such, it is subject to ERISA's strict fiduciary standards. See id.  
9 Moreover, Plaintiffs have asserted this claim against the Plan and the alleged Plan  
10 Administrator. The Court finds that Plaintiffs have asserted sufficient facts to overcome a  
11 Rule 12(b)(6) motion to dismiss their ERISA breach of fiduciary duty claim. Accordingly,  
12 Defendants' Motion to Dismiss Count III is denied. Nevertheless, the Court will hold in  
13 abeyance Plaintiffs' breach of fiduciary duty claim pending the outcome of Plaintiffs' FLSA  
14 claim.

#### 15 **D. RICO**

16 Plaintiffs allege that Defendants engaged in a pattern of mail fraud, whereby every  
17 time Defendants mailed a paycheck to Plaintiffs, Defendants "mislead Plaintiffs about the  
18 amount of wages to which they were entitled, as well as their status and rights under the  
19 FLSA." Compl. at ¶ 257.

20 Defendants argue that Plaintiffs RICO claim is unripe because Plaintiffs must first  
21 establish that they were entitled to wages or overtime under FLSA for which they have not  
22 been compensated. Similar to Plaintiffs' ERISA claims above, the alleged events possibly  
23 giving rise to Plaintiffs' RICO claim already have allegedly occurred and the only delay in  
24 the Court's ability to consider Plaintiffs' RICO claims is that it must first rule on Plaintiffs'  
25 FLSA claim. Therefore, the Court is not persuaded by Defendants' ripeness argument here.

26 Citing Miller v. Yokohama Tire Corp., 358 F.3d 616, 621, (9th Cir. 2004), Defendants  
27 also argue that Plaintiffs fail to state a claim under RICO arguing that RICO claims cannot  
28

1 be predicated on alleged violations of wage and hour laws. Plaintiffs point out in their  
2 Response, that Miller is a state wage and hour case (that did not allege FLSA violations) in  
3 which the court dismissed plaintiffs RICO claims because they were based on a  
4 misrepresentation of law (regarding plaintiff's legal status as an exempt employee), and not  
5 on a misrepresentation of fact. Id. In Reply, Defendants contend that the RICO claim in the  
6 instant case is also based on misrepresentations of law. However, the dispute here is not over  
7 a legal question of whether Plaintiffs should be categorized as hourly or non-hourly  
8 employees. Rather, the dispute is over how much pay these hourly-employees should have  
9 received. This is a question of fact. Thus, the issue in Miller is distinguishable from the  
10 issue here.

11 In support of their RICO claim Plaintiffs cite Choimbol v. Fairfield Resorts, Inc., 428  
12 F.Supp. 2d 437, 443 (E.D.Va. 2006), in which the court upheld similar allegations that  
13 employees' paychecks contained actionable fraudulent misrepresentations, which were  
14 sufficient to sustain plaintiffs RICO claim. Defendants do not distinguish Choimbol in their  
15 briefing. During oral argument Defendants attempt to distinguish Choimbol by claiming that  
16 in Choimbol the RICO claim was predicated on actionable fraud whereas, here, Defendants  
17 contend, the RICO claim is predicated on success on the FLSA claim. Defendants again point  
18 the Court to Miller, 358 F.3d at 621. However, the Court has already determined that the  
19 issue in Miller is distinguishable from the issue here.

20 A *prima facie* RICO case requires the following: (1) conduct; (2) of an enterprise; (3)  
21 through a pattern; (4) of racketeering activity. Miller, 358 F.3d at 620. Plaintiffs have  
22 alleged that every time Defendants mailed Plaintiffs a paycheck, Defendants "mislead  
23 Plaintiffs about the amount of wages to which they were entitled, as well as their status and  
24 rights under the FLSA." Compl. at ¶ 257. This assertion meets the requirements for a *prima*  
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1 *facie* RICO case, as Plaintiffs have alleged conduct (mailing paychecks), of an enterprise<sup>6</sup>  
 2 (Defendants-businesses), through a pattern (continually mailing incorrect paychecks) of  
 3 racketeering activity (denying Plaintiffs' pay due them). Plaintiffs have asserted a *prima*  
 4 *facie* case of RICO sufficient to overcome a Rule 12(b)(6) motion to dismiss. Accordingly,  
 5 Defendants' Motion to Dismiss Plaintiffs' RICO claim is denied. The Court will, however,  
 6 hold in abeyance Plaintiffs' RICO claim pending the outcome of Plaintiffs' FLSA claim.

### 7 **III. RULE 23**

8 Defendants have asserted that Plaintiffs' Rule 23 "opt-out" certification allegations,  
 9 which includes Plaintiffs' ERISA and RICO claims, should be struck. Defendants contend  
 10 that Plaintiffs' ERISA and RICO claims cannot be maintained as Rule 23 "opt-out" claims  
 11 since they are dependent on Plaintiffs' underlying FLSA claims, which are subject to the  
 12 "opt-in" mechanism of 29 U.S.C. § 216(b).

13 The FLSA provides for participation in the collective action on an opt-in basis.  
 14 See 29 U.S.C. § 216(b) (An employee cannot be a plaintiff "unless he gives his consent in  
 15 writing to become such a party and such consent is filed in the court."). By contrast, under  
 16 Rule 23, Fed.R.Civ.P., each member of the class is bound by the court's judgment unless the  
 17 class member requests exclusion from the class. Fed.R.Civ.P. 23(c)(2).

18 Citing Silverman v. Smithkline Beecham Corp., 2007 WL 3072274 (C.D. Cal. Oct.  
 19 16, 2007); Ellison v. Autozone, Inc., 2007 WL 2701923 (N.D. Cal. Sept. 13, 2007), Plaintiffs  
 20 assert that their FLSA "opt-in" actions are compatible with Rule 23 "opt-out" class actions.  
 21 Plaintiffs also assert that determining the scope of a class action is a case management issue  
 22 that is premature at this stage of the litigation. Silverman, 2007 WL 3072274 at \*2.

23 Defendants distinguish these cases by asserting that both Silverman and  
 24 Ellison involved FLSA and state law claims, not FLSA-dependent ERISA and RICO claims,

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 26 <sup>6</sup> An enterprise can include a "group of persons associated together for a common  
 27 purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583  
 28 (1981).

1 as are pled here. Because the ERISA and RICO claims are dependent on the underlying  
2 “opt-in” FLSA claims, Defendants contend, the proposed “opt-out” classes are defectively  
3 overbroad and unworkable.

4 The only case in which a court has addressed the compatibility between opt-in FLSA  
5 and opt-out ERISA claims is Greer v. Challenge Financial Investors Corp., 2005 WL  
6 3502270 (D. Kan. Dec. 22, 2005). Though Greer is distinguishable in that the ERISA claims  
7 the plaintiffs sought to add to their existing FLSA collective action claims were not  
8 contingent upon a finding of liability under the FLSA, the court there rejected defendants’  
9 argument that the ERISA Rule 23 class action claims were irreconcilable with the FLSA opt-  
10 in claims. Id. at \*3. Here, each of the FLSA, ERISA, and RICO claims depend on many of  
11 the same facts. The Court is, however, mindful that if it does not allow Plaintiffs’ ERISA  
12 and RICO claims to proceed in the instant litigation, these claims may later be barred by  
13 collateral estoppel or the statute of limitations.

14 During oral argument Plaintiffs indicated that the opt-out classes for the ERISA and  
15 RICO claims will be limited to those Plaintiffs who opted in to the FLSA claim. The Court  
16 will hold in abeyance Plaintiffs ERISA and RICO claims pending the outcome of Plaintiffs’  
17 FLSA claim. If Plaintiffs succeed on their FLSA claim, the Court will allow Plaintiffs to  
18 proceed at that time with their ERISA and RICO claims on a Rule 23 class-action basis,  
19 provided the class is narrowly defined only as to those who opted-in to the FLSA claim.

#### 20 **IV. PLAINTIFFS’ CLAIM AGAINST THE PLAN**

21 Defendants assert that Plaintiffs have failed to allege a claim against the Plan because  
22 Plaintiffs “failed to allege any facts that could establish liability” with respect to the Plan.  
23 Motion to Dismiss (Doc. 72) at p. 18. Defendants assert that Plaintiffs never allege that the  
24 Plan itself did anything or had any responsibility but merely lump the Plan with the other  
25 Defendants as to all four causes of action.

1 In response, Plaintiffs do not dispute that they have not sufficiently asserted a claim  
2 against the Plan for violations of the FLSA or RICO. Plaintiffs do contend that they have  
3 sufficiently asserted an ERISA claim against the Plan.

4 ERISA provides that an employee benefit plan may be sued under ERISA. 29 U.S.C.  
5 § 1132(d)(1). Here, in their Complaint, Plaintiffs identify the statute under which they have  
6 asserted their ERISA claims, they state that the claims are brought “for defendants’ failure  
7 to maintain accurate payroll records and credit plaintiffs’ 401(k) plans with their on-reduced  
8 weekly wages and correct overtime compensation.” Compl. ¶ 1. Plaintiffs also allege that  
9 Defendants, including the Plan, failed to make and keep accurate records of all Plaintiffs’  
10 time worked and, thus, those records are insufficient to determine benefits. Compl. ¶¶ 1,  
11 249-51. Plaintiffs further allege that Defendants breached their fiduciary duties under  
12 ERISA by failing to credit or even investigate crediting overtime pay as compensation used  
13 to determine benefits. Compl. ¶ 251. In considering the allegations as set forth in their  
14 Complaint, it appears that Plaintiffs have meet the Twombly standard for pleading an ERISA  
15 claim against the Plan, and it is not clear that no relief could be granted under any set of facts  
16 that could be proved consistent with the allegations. See Falkowski, 309 F.3d at 1132.  
17 Accordingly, Defendants’ Motion to Dismiss the Plan is denied as to Plaintiffs’ ERISA  
18 claims.

## 19 **V. EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS**

20 Plaintiffs move for equitable tolling of the statute of limitations. To put Plaintiffs’  
21 Motion in context, a brief procedural background is in order. On January 15, 2008, Plaintiffs  
22 filed the instant Class Action Complaint on behalf of themselves and all others similarly  
23 situated as a collective action under the FLSA, ERISA, and RICO. On January 16, 2008,  
24 Plaintiffs filed a motion for expedited collective action notification (Doc. 3) and a Motion  
25 for expedited briefing on their motion for collective action notification (Doc. 5). On January  
26 29, 2008, Defendants Eastern and SCI Houston filed a motion to stay plaintiffs’ motion for  
27 expedited collective action notification (Doc. 46), and a response in opposition to plaintiffs’  
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1 motion to expedite consideration of defendants' motion to expedite briefing on their motion  
2 for collective action notification (Doc. 49).

3 On January 31, 2008, the Court issued a brief Order (Doc. 49), which denied without  
4 prejudice Plaintiffs' motion for expedited collective action notification and directed that  
5 Plaintiffs may re-file a motion for class notification after the Court rules on Defendants'  
6 then-anticipated motion to dismiss. The Order also denied Plaintiffs' motion for expedited  
7 briefing on their motion for collective action notification, denied Defendants' motion to stay,  
8 granted Defendants' motion for expedited consideration of Defendants' motion to stay and  
9 Ordered Defendants to file their motion to dismiss by February 8, 2008, directing the parties  
10 to brief the motion to dismiss on an expedited basis.

11 On February 8, 2008, all Defendants filed motions to dismiss (Docs. 88, 89, 90).  
12 These motions are fully briefed. On May 5, 2008, Plaintiffs filed the instant Motion and  
13 Memorandum of Points and Authorities in Support of their Motion for An Equitable Toll of  
14 the Statute of Limitations (Doc. 174). This Motion also is fully briefed.

15 In their Motion, Plaintiffs assert that equitable tolling is appropriate to prevent the  
16 expiration of Plaintiffs' claims because of delays in the case not due to the fault of the  
17 Plaintiffs. Defendants oppose Plaintiffs' Motion for Equitable Tolling asserting that  
18 equitable tolling is only warranted in two situations, namely: (1) where the plaintiffs actively  
19 pursued their legal remedies by filing defective pleadings within the statutory period; or (2)  
20 where the defendant's misconduct caused plaintiffs to miss the deadline.

21 The commencement of a lawsuit does not act to toll the statute of limitations under  
22 the FLSA for putative class members. Instead, the statute of limitations continues to run  
23 until putative class members file consent forms. See 29 U.S.C. § 256; see also Grayson v.  
24 K-Mart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996), cert. denied, Helton v. K-Mart, 519 U.S.  
25 987 (1996). Courts have equitably tolled the statute of limitations in a FLSA action when  
26 doing so is in the interest of justice. See, e.g., Partlow v. Jewish Orphans' Home of Southern  
27 Cal., Inc., 645 F.2d 757, 760-61 (9th Cir. 1981) (equitable tolling proper where plaintiffs  
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1 were without fault and “practical effect of not tolling the statute would be to bar forever any  
2 claim” the employees had against defendant), abrogated on other grounds by  
3 Hoffman-LaRoche Inc. v. Sperling, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989);  
4 see also Beauperthuy v. 24 Hour Fitness USA, Inc., 2007 WL 707475 at \*8 (N.D.Cal. Mar.  
5 6, 2007) (equitably tolling FLSA statute of limitations because of factors outside plaintiffs’  
6 control, including litigation, arbitration and settlement of related action).

7 The Court finds it appropriate in the interest of justice to toll the statute of limitations  
8 here. Defendants here will not be prejudiced by an equitable toll. See, e.g., Baden-  
9 Winterwood, 484 F.Supp. 2d 822, 828 (S.D. Oh. 2007) (defendant was fully aware of its  
10 scope of potential liability on the date the suit was filed). If not tolled, the statute of  
11 limitations could act to deprive consenting employees of their right of action. Partlow, 645  
12 F.2d 761; see also Lee v. ABC Carpet & Home, 236 F.R.D. 193, 199 (S.D.N.Y. 2006)  
13 (holding that “the time during which a party is prevented from obtaining legal relief is not  
14 counted for purposes of statutes of limitations.”). Here, the Court has not made a  
15 determination as to Plaintiffs’ collective action notification pending its determination of  
16 Defendants’ Motions to Dismiss. As the Supreme Court noted in Hoffman-La Roche Inc.  
17 v. Sperling, 493 U.S. 165, 170 (1989), the inherent benefits of the collective action “will  
18 disappear” if plaintiffs are not notified of the suit before their statute of limitations expires.  
19 Similarly, here, without tolling the statute of limitations, Plaintiffs will have lost the time  
20 between the filing of the Motions to Dismiss on February 8, 2008 until the filing of the  
21 instant Motion that they could have used to notify potential class members. Accordingly,  
22 Plaintiffs’ Motion for an Equitable Toll of the Statute of Limitations is granted. Plaintiffs’  
23 statute of limitations is hereby tolled from the date Defendants filed their Motions to Dismiss,  
24 February 8, 2008, until the date Plaintiffs re-file their motion for expedited collective action  
25 notification.

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**CONCLUSION**

For the foregoing reasons,

**IT IS ORDERED** granting SCI Eastern Market Support Center and SCI Houston Market Support Center's Motion to Dismiss (Doc. 55). SCI Eastern and SCI Houston are hereby dismissed from these proceedings.

**IT IS FURTHER ORDERED** directing additional discovery as to the personal jurisdiction of Defendants Thomas Ryan and Julie Douglas. The parties are directed to file any briefing on this issue after they have had the opportunity to conduct such discovery (Doc. 54).

**IT IS FURTHER ORDERED** denying the Motion to Dismiss as to Defendants Jane D. Jones, Gwen Petteway, Thomas Ryan, Curtis Briggs (Doc. 54).

**IT IS FURTHER ORDERED** denying Defendants' Motion to Dismiss Plaintiffs' FLSA claim (Doc. 72).

**IT IS FURTHER ORDERED** denying Defendants' Motion to Dismiss Plaintiffs' ERISA claims (Doc. 72). The Court will hold these claims in abeyance pending the outcome of Plaintiffs' FLSA claim.

**IT IS FURTHER ORDERED** denying Defendants' Motion to Dismiss Plaintiffs' RICO claim (Doc. 72). The Court will hold this claim in abeyance pending the outcome of Plaintiffs' FLSA claim.

**IT IS FURTHER ORDERED** denying Defendants' Motion to Strike the Rule 23 Allegations as to the ERISA and RICO claims but directing that no action be taken as to the Rule 23 class until after the FLSA claim is decided (Doc. 72).

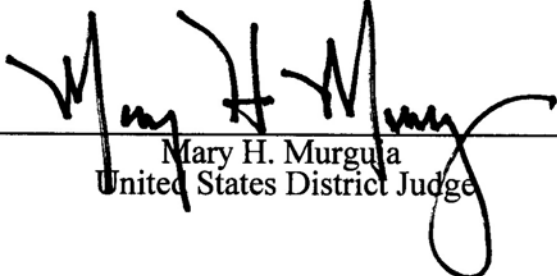
**IT IS FURTHER ORDERED** granting in part and denying in part Defendants' Motion to Dismiss the Plan (Doc. 72). Plaintiffs' FLSA and RICO claims are dismissed as to the Plan. Plaintiffs' ERISA claims may proceed as to the Plan.

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1           **IT IS FURTHER ORDERED** granting Plaintiffs' Motion for an Equitable Toll of  
2 the Statute of Limitations (Doc. 174). Plaintiffs' statute of limitations is, hereby, tolled from  
3 the date Defendants filed their Motions to Dismiss, February 8, 2008, until the date Plaintiffs  
4 re-file their motion for expedited collective action notification.

5           DATED this 29<sup>th</sup> day of September, 2008.

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Mary H. Murgula  
United States District Judge